IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LAVELL LITTLETON, Petitioner, v. HON. CLARK MUNGER, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	2 CA-SA 2009-0067 DEPARTMENT B DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR-20083646

JURISDICTION ACCEPTED; RELIEF GRANTED

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¶1 In this special action, petitioner Lavell Littleton, the defendant in the underlying criminal proceeding, challenges the respondent judge's order compelling him to disclose to the respondent and real party in interest State of Arizona copies of his income tax returns. Littleton has no equally plain, speedy, and adequate remedy by appeal. *See* Ariz. R. P. Spec. Actions 1(a) ("[S]pecial action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal."); *see also Miller v. Kelly*, 212 Ariz. 283, ¶ 1, 130 P.3d 982, 983 (App. 2006) (accepting jurisdiction of special action challenging order compelling petitioner physician to disclose amounts paid in settlement of malpractice actions because remedy by appeal not equally plain, speedy or adequate); *Sun Health Corp. v. Myers*, 205 Ariz. 315, ¶ 2, 70 P.3d 444, 446 (App. 2003) (accepting special action jurisdiction to address propriety of order requiring disclosure of privileged information because "appeal offers no adequate remedy for the prior disclosure of privileged information"). We therefore accept jurisdiction of this special action and because, as discussed below, the respondent judge abused his discretion, we grant relief. *See* Ariz. R. P. Spec. Actions 3(c).

¶2 Littleton contends in his special action petition that, during an investigation of possible drug-related activities and the possibility that a certain vehicle was being used by persons suspected of driving while their licenses were suspended, Tucson police officers tried to make contact with him and that he fled from them on foot. The state counters that Littleton was holding onto something he had removed from the right pocket of his pants and threw it onto the ground as he ran. After the officers caught and detained Littleton, they found on the ground, near where he had been running, four white rocks later identified as

crack cocaine. Littleton denied the drugs were his and that he had thrown them onto the ground.

¶3 Littleton was charged with possession of a narcotic drug, a class four felony. The state filed a motion seeking to preclude Littleton from introducing at trial statements he had made to police that the drugs were not his and evidence about incidents during which police allegedly had harassed and mistreated him because of their race-based bias against him and his brother Cornell Littleton. In his response to the motion, Littleton, who is African-American, insisted officers had harassed him and Cornell for months before Littleton was arrested, accusing them of being criminals and using racial slurs against them. Littleton asserted certain individuals had either witnessed these incidents or could corroborate their occurrence and were prepared to testify on his behalf at trial.

¶4 At the evidentiary hearing on the state's motion, Tucson Police Officer Kyle Kohlmeyer[1] testified about his contacts with Littleton before Littleton was arrested. He explained Littleton had been the target of surveillance for suspected drug-related activity because of what the officers had heard about him from others and their observations during surveillance of a house that was "under his control." Kohlmeyer testified that officers had observed "patterns consistent with narcotic sales," that he had wanted Littleton "out of [his] neighborhood," and that he had told Littleton he was going to be "after him." According to Kohlmeyer, officers obtained a warrant to search a home Littleton had been using; police

[1]Kohlmeyer is now retired but was an active member of the police force during the relevant period.

officers were informed that Littleton paid no rent for the house because he had assaulted and threatened the person who owned or rented it.

¶5 At one point during Kohlmeyer's testimony, the respondent judge began to question him. The respondent asked Kohlmeyer whether, at the time the search warrant for the house was obtained, Kohlmeyer had believed Littleton was selling drugs in that neighborhood; Kohlmeyer said yes. The respondent then asked Kohlmeyer: "Do you know if Mr. Lavell Littleton was employed or how he earned his living?" The officer responded: "I saw no signs of employment during my surveillance. I heard no mention of employment. My understanding is he was employed solely by the sale of crack cocaine." The respondent then asked defense counsel whether Littleton had "tax returns for these years?" When defense counsel answered that he had not discussed this with Littleton, the respondent directed him to do so, reiterating: "I want to see those tax returns." He added: "I want to see his bank accounts, I want to see his earnings, I want to see all of that information."

¶6 After a brief recess, defense counsel informed the respondent that Littleton was "invoking his Fifth Amendment rights in terms of tax returns." The respondent stated the Fifth Amendment privilege does not apply to tax returns, adding: "Come in here with evidence or show me the tax returns. . . . I want those tax returns by the end of this month." The respondent stated that if Littleton intended to assert as his defense that the officers had framed him because they were racially biased against him, the state would be permitted to introduce evidence that Littleton was a drug dealer and that dealing drugs was how he made a living. "If he doesn't earn his money selling drugs," the respondent stated, "I want to know

how he does earn a living. Because if he doesn't have visible means of support, that would indicate that this officer's concern may be well-grounded. He's supporting himself somehow. I'm not hearing a response that he's employed. Is he gainfully employed?"

¶7 Defense counsel informed the respondent that Littleton had been working at the "VFW" at the time he was arrested, to which the respondent replied:

> Then I want to know how much did he make. How does he support himself? Where does he live? How much rent does he pay? . . . All of that, it's all part of this issue of what's the motivation here. He can't—he can't say it's only racially motivated. This officer has . . . articulated grounds for being concerned about what the defendant—how the defendant earns his living. If we're going to test that, I need to test it.

The respondent reiterated after further discussions and during a follow-up hearing the next day, that he wanted the tax returns, ordering Littleton to produce them by September 18. In his minute entry following the second day of the hearing, the respondent ordered Littleton to produce his tax returns by September 18.[2] This special action followed.

¶8 Among the arguments Littleton raises in his petition for special action relief is that the respondent judge abused his discretion by ordering Littleton to provide the respondent and the state with his income tax returns because they are irrelevant. Thus, he asserts, neither the returns nor the information in them would be admissible at trial.[3]

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[2]The respondent has given Littleton an extension of the time for producing the tax returns and has made clear he would give him additional time if necessary in order to permit Littleton to seek special action review of the order by this court.

[3]Littleton also suggests the tax returns may not exist, positing there could be a lawful reason for a person's not filing a tax return, such as the fact that the person is exempt because of the amount of the person's gross income.

¶9 An appellate court reviews a trial court's ruling on the admissibility of evidence and the determination of the relevancy of evidence for an abuse of discretion. *State v. Montano*, 204 Ariz. 413, ¶ 55, 65 P.3d 61, 73 (2003); *see also State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997). Similarly, "[a] trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *State v. Fields*, 196 Ariz. 580, ¶ 4, 2 P.3d 670, 672 (App. 1999). But the scope of disclosure required under Rule 15, Ariz. R. Crim. P., is a question of law, which we review de novo. *State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006). And, "[i]nformation is not discoverable unless it could lead to admissible evidence or would be admissible itself." *Fields*, 196 Ariz. 580, ¶ 4, 2 P.3d at 672; *cf. Brown v. Superior Court*, 137 Ariz. 327, 332, 670 P.2d 725, 730 (1983) (disclosure duty under civil rules of discovery, Rule 26.1, Ariz. R. Civ. P., limited to relevant evidence, which means evidence itself admissible or reasonably likely to lead to discovery of admissible evidence).

¶10 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401; *see also* Ariz. R. Evid. 402 (irrelevant evidence is inadmissible). Thus, to be relevant, the evidence must relate to a disputed "consequential fact" and "alter the probability . . . of a consequential fact." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733 P.2d 1073, 1079 (1987).

¶11 We note at the outset that Littleton's tax returns are not among the kinds of documents a defendant is automatically required to disclose under Rule 15.2, Ariz. R. Crim. P. Nor is the respondent judge's order justified by Rule 15.2(g), which provides as follows:

> Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of his or her case for material or information not otherwise covered by Rule 15.2, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to the prosecutor.

As the transcript from the evidentiary hearing establishes, it was the respondent who initiated the questions about Littleton's livelihood and demanded that Littleton produce his tax returns.[4] The prosecutor did not request them. Nor did the prosecutor establish he had a "substantial need" for the documents. Ariz. R. Crim. P. 15.2(g).

¶12 Additionally, we agree with Littleton that the respondent abused his discretion by ordering him to produce his tax returns because the documents, if they exist, and the information in them, are irrelevant. Littleton has been charged with possession of a narcotic drug in violation of A.R.S. § 13-3408(A)(1). Littleton correctly asserts that "[n]o elements of this charge have anything to do with paying, documenting, or filing federal or state income taxes." He is correct that whether he has filed a tax return "does not relate to any fact

[4]Although we grant Littleton special action relief on another ground, we are troubled by the circumstances that resulted in the respondent's order—that it was issued in the absence of any request by the state and that it requires a criminal defendant to provide potentially inculpatory evidence against himself. However well-intentioned the respondent's order may have been, those circumstances create the appearance that respondent has improperly injected himself into the adversarial process.

consequential to his arrest, the pleadings and substantive law related to his case, or the evidence against him." The tax returns and information they contain are irrelevant generally to whether he committed the charged offense. And if Littleton did not file tax returns, that fact is not only irrelevant to whether he possessed cocaine, but if he had been required by law to file such returns, the evidence that he failed to do so would relate to a prior act and arguably would be inadmissible under Rule 404(b), Ariz. R. Evid.

¶13 The respondent judge, however, seems to have based his ruling on the fact that Littleton had made clear his intent to raise as a defense in this case that the officers were racially biased against him and had been targeting him, essentially "setting him up" to appear as though he had committed an offense he did not commit. The respondent's comments at the evidentiary hearing establish he believed Littleton had opened the door to evidence about his financial status by asserting this defense. Thus, the respondent considered relevant any evidence about whether Littleton had a means of supporting himself, other than by dealing drugs.

¶14 We recognize Littleton's defense—that the officers' actions were racially motivated—arguably entitled the state to present evidence that the officers were instead motivated by information they possessed regarding Littleton's alleged criminal behavior.[5] But the record before the respondent judge established that the officers had neither possessed

[5]Our decision is not to be construed as a finding on the admissibility of evidence of other illegal or improper acts in which Littleton may have engaged. We are simply specifying the information that appears to have been relevant to the officers' decision to focus their investigation and surveillance on Littleton.

nor sought Littleton's tax returns. Thus, the contents of any tax return Littleton had filed or any evidence that he had failed to file a tax return, could not be relevant to demonstrating the basis for the officers' suspicions regarding Littleton's criminal behavior. Because the pertinent evidentiary question raised by Littleton's defense was not whether he previously had engaged in criminal behavior but rather whether the officers reasonably had suspected him of engaging in such behavior, the respondent abused his discretion when he ordered Littleton to provide evidence that was neither sought by the state nor relevant to proving any issue "'of consequence to the determination of the action.'" *Hawkins*, 152 Ariz. at 496, 733 P.2d at 1079, *quoting* Ariz. R. Evid. 401.

¶15 We conclude that neither Littleton's income tax returns and the information they contain nor his failure to file tax returns, if that is the case, is admissible or likely to lead to the discovery of admissible evidence. Therefore, the respondent judge abused his discretion by ordering Littleton to produce his tax returns, and we vacate the respondent's August 18, 2009 order. Given our resolution of this issue, we need not address the other arguments Littleton raises in his petition.

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PETER J. ECKERSTROM, Presiding Judge

Judge J. William Brammer, Jr., and Judge Vásquez concurring.